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November 7, 2003

U.S. Department of State, CA/OCS/PRI
Adoption Regulations Docket Room
SA-29
2201 C Street, NW
Washington, D.C. 20520

Re: Docket Number: State/AR-01/96

To Whom It May Concern:

Please allow me to introduce myself as an assistant program director for an international adoption agency.

I agree that it is in the best interest of the child and adoptive families to have checks and balances. I am concerned that many smaller international adoption agencies will have no choice but to close their doors, as a result of the extensive regulations being proposed regarding the Hague Treaty on Adoptions.

These regulations will result in less competition within the market place and give international adoptive parents less choice in the selection of an Agency. The outcome of this will only mean that more children will not have forever families and more orphans will linger in institutional care.

I am attaching our comments and recommendations on the proposed Hague regulations and it is my hope that your committee will strongly consider them in making your decisions.

Thank you for your consideration.

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COMMENTS ON HAGUE REGULATIONS

COMMENTS ARE OFFICAL FROM
CHILDREN'S HOUSE INTERNATIONAL
1236 North 150 West
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CHI is a non-profit international adoption agency, licensed in Utah since 1975 and also now licensed in Washington and Florida, serving children in 18 countries.

Children's House International believes that every child should remain with their birth parents whenever possible or should be adopted by a family within their country of birth. When those options are not readily available, international adoption should be a viable option. Institutions and foster care do not provide optimal conditions for the full emotional and physical development of children.

First and foremost: We respectfully request that these regulations come out again in **DRAFT** form and not as final regulations. There is obvious evidence that the Department of State, agencies and state licensing offices need more time to prepare for these regulations, as well as having more time to write them in a manner that is reasonable and practical. Please ---bring out these comments in **DRAFT** form.

We request the following subjects to be clarified in the regulations:

1. Why isn't the Department of State going to be part of an enforcement entity regarding the post placement phase of the adoption? In other words, we understand from the Public Meeting on this issue, that the DOS is not going to make sure that family's who agree to provide post placements will indeed have to provide them or be held accountable for not doing so. We (CHI) work in country's that require our family's provide follow-up reports and if we do not fulfill that requirement, our license or agreement to work there is in jeopardy. We request assistance from the DOS regarding ensuring that families do follow those requirements. If it is not included in the regulations, we have no recourse.

2. We understand that the regulations are to regulate agencies who work in Hague convention countries. If this is the premise, then we request that all complaints related to an adoption agency service only be entertained by the DOS (and accrediting entities) only IF the complaint is in regard to a convention adoption, and for no other adoption situation. In addition, we request the same consistency in regard to the question of who is a small agency. An agency should only be counting the convention adoptions, not all adoptions they service to find out if they qualify as a small or large agency. We request consistency in these matters.

3. Please clarify and define what a "complaint" is in regard to complaints against an adoption agency from a family.

Subpart D – Application Procedures for Accreditation and Approval

96.21 Choosing an Accrediting Entity

Please clarify what is meant by "jurisdiction over its application" in (a) and (b) of this section

If this implies that accrediting entities will have a geographical region that they can cover and agencies may only apply to a specific accrediting entity, then we are opposed to such a

definition. Such a provision would prohibit an agency's choices in applying for accreditation thereby making the field unnecessarily restrictive. We propose that agencies be allowed to apply to any accrediting entity available and that all references to the phrase "jurisdiction over its application" be deleted from 96.21. This is also extremely important considering some agencies are licensed in more than one state. If they are accredited in one state, will they be considered accredited for the entire agency, even though the other offices are in other states. If you don't make this clear, an agency licensed in more than one state may be burdened to be licensed more than one time. Please clarify and simplify the process.

96.33 Budget, audit, insurance and risk assessment requirements

96.33 (e)

In section (e) the regulations require cash reserves or other financial resources to meet its operating expenses for three months. There are cyclical periods of down time in international adoption, especially during the summer months when many foreign countries close for holidays and do not process cases. There are also unforeseen changes in foreign countries, which may result in temporary loss of budgeted income. In addition, non-profits are reliant on the economy. Since 9/11, we have seen a decrease in donations and services requested. Reserves tend to go down during these periods and are recouped later. A non-profit should not be required to have a certain amount of cash reserve in the bank in the same manner that a for-profit business does. In addition, what is the definition of operating expenses? Does that include overseas support of orphanages monthly? Please be more specific as to what would be included in this 3 month requirement.

1. Three month's worth of <u>cash reserves</u> is too much for small agencies that are not funded through endowments, and would cause intermittent non-compliance with this regulation.
2. Secondly, some of the larger agencies who provide state services are frequently not paid for those services on a regular basis due to their State's budgetary constraints. These agencies could potentially lose their accreditation through no fault of their own, as the money due to them has not been paid. *(i.e.*, in 2003 some Illinois agencies providing private services had to wait six months or more for payment from the State.)
3. Third, requiring cash reserves of this amount would cause an undue hardship on newly established organizations, thus making it difficult for new or potentially new child welfare agencies to work in Hague countries.

Standard business practice for non-profits when dissolving an organization is to sell the organization's assets for distribution to creditors. If the statute's intent was to protect the organization's assets for reimbursing prospective adoptive parents for services not provided, then general assets could be substituted for cash reserves.

Recommend the following revision:

> (e) The agency's or person's balance sheets show that it operates on a sound financial basis and ~~generally~~ maintains, <u>on average,</u> sufficient ~~cash reserves~~ <u>assets</u> or other financial resources to meet its operating expense for three months, taking into account its projected volume of cases. <u>**The agency or person must develop a Risk Management Contingency Plan for the possibility of reorganization or dissolution of the organization, and include provisions for an organized closure and reimbursement to clients of monies paid for services not yet rendered.**</u>

96.33 (g)
We would like a clarification on the meaning of an "independent professional assessment of risks". If this implies the mandatory use of an independent risk assessment firm then we would like to voice the following concerns:

A professional assessment of risks does not have to be performed by an independent firm to be completed properly. The risk assessment can be done professionally by a combination of the agency's management, insurance agent and/or financial and legal counsel(s). Requiring review by an independent risk assessment firm would also cause an undo financial hardship for small agencies by significantly raising the overall costs of accreditation.

Further, during this risk assessment the availability and cost of insurance coverage must be part of the consideration. For example, the quote for Director's and Officer's insurance in Illinois for an agency doing under 25 placements is over $30,000 a year. In many states D & O insurance is impossible to obtain or cost prohibitive.

Finally, as noted in our comments on section **§ 96.39(d)**, due to the confusion regarding terminology surrounding the provision which limits an agency's right to contract, we recommend deleting the last clause referencing "blanket waiver" for purposes of "professional risk assessment".

Recommend the following revision:

> (g) The agency or person ~~uses an independent~~ **conducts a** professional assessment of the risks it assumes, **and includes the availability of coverage, cost, and the requirements of (h) in this section,** as the basis for determining the type and amount of professional, general, directors' and officer's and other liability insurance to carry. The risk assessment includes an evaluation of the risks of using supervised providers as provided for in § 96.45 and § 96.46 and of providing adoption services to clients. ~~who, consistent with § 96.39(d), will not sign blanket waivers of liability.~~

96.33(h) [Section to be revised slightly to include – agencies don't have control over these factors (i.e. insurance availability); Clause for non-compliance grace period and that agencies "make reasonable efforts to maintain insurance and can demonstrate such efforts"; Government needs to assist with insurance – several options including re-insurance, insurance for families, federal underwriting, etc.; and cite charitable immunity clauses in States.]

Our agency's experience with insurance is that we currently pay $20,000 a year for $1,000,000 coverage. This coverage will go up 15% this next year, guaranteed, and that doesn't include the added liability the Department wants us to add if these current regulations come into play. . We are not now covered for overseas persons involved with the adoption process.

The provisions that cover risk and liability issues directly counter certain goals of not only the Hague Convention but of the regulations themselves. While initially the adoption agencies may pay the price by increased costs or going out of business, ultimately, the children of foreign nations and adoptive parents will suffer from the high costs and responsibilities heaped on agencies, and there will likely be a chilling effect on international adoption to the benefit of no one.

Considering the current difficulties in obtaining insurance coverage, carriers will certainly resist providing at least $1,000,000 in damages for a single occurrence when adoption expenses rarely rise above $30,000 and much of these expenses are now setoff against government tax credits and employer contribution benefits. Such a high floor of insurance certainly invites litigation, and is unfair to agencies because of unknown medical and developmental problems and the inherent risks in adopting institutionalized orphans through intercountry adoption. We urge the Department to reconsider this stringent requirement which will prove exceedingly difficult for agencies to comply with and will force many agencies or persons to not become accredited resulting in fewer children being placed.
The IAA does not specify a dollar amount for insurance and simply states in Sec. 203(b)(1)(E) that "The agency agrees to have in force adequate liability insurance for professional negligence and any other insurance that the Secretary considers appropriate".

Recommend the following revision:

> (h) The agency or person maintains insurance in amounts reasonably related to its exposure to risk.

We also strongly recommend that the Department provide direct assistance with regards to insurance for agencies and persons to satisfy the accreditation requirements. One suggestion is to form a Hague Insurance Commission and have the government underwrite the insurance and establish maximum limits on how much money adoptive families can obtain in liability suits. The commission would also need to address the number of occurrences covered in a policy year. We recommend three (3) as the limit since that appears to be a typical ceiling on occurrences.

96.35 - Suitability of agencies and persons to provide adoption services consistent with the Convention.
96.35(b)(4) and (5) and (6)
The prescribed ten-year period for which agencies must provide accrediting entities with any disciplinary actions, complaints and investigations is too long and will cause an unnecessary burden to the agency.

Recommend that the time period be reduced to five years in all sections.

In addition, the "written complaints" mentioned in section (5) are not clearly defined. We would ask the Department to delineate between frivolous accusations and substantiated complaints so that neither the agency nor the accrediting entity is overwhelmed by unnecessary paperwork.

We suggest the following revision:

> (5) For the prior **five**-year period, any **substantiated** written complaint(s) against the agency or person ...

Furthermore, we are unclear of the definition of "malpractice complaints" in paragraph (6) and how they differ from written complaints noted in (5). If there is no difference, then we recommend "malpractice complaints" be struck from regulation (6) since it is adequately provided for in the preceding section.

96.37 – Education and experience requirements for social service personnel.

96.37(d) Credentials of Supervisors

The flexibility of this proposed regulation in permitting supervisors to have professional degrees in social work "or a related human services field" is beneficial to adoption agencies. This allows flexibility in hiring professionals from a broad educational background.

96.37(f) Master's Degree Requirement

Requiring the home study personnel to have a Master's in Social Work will have a negative effect on the entire adoption industry. We have highlighted three main reasons why this requirement will have a negative effect.

Scarcity of qualified personnel

If enacted as proposed, this Regulation will severely restrict the availability of qualified home study personnel. In many geographical areas, especially in the more rural parts of the country, there are few master's degree recipients available, and those that are do not typically have experience in international adoptions.

Many master's programs do not specifically address the topic of adoption. Most international adoption professional's experience has come from "on the job" training and while a master's degree can be extremely helpful clinically, it does not ensure a strong knowledge of intercountry adoption or how to prepare a home study.

The strict requirement of one particular degree limits the ability of the accredited agency to select home study personnel on the basis of experience, personal sensitivity, moral character – without which one can not judge the character of the adoptive parents – and many other considerations other than academic degrees.

Restricts Choices for Prospective Adoptive Parents and Increases Costs

This requirement will reduce the number of choices for prospective adoptive parents in terms of direct service agencies providing home study and post placement services. The increased expense of having to hire MSWs to do home studies would significantly increase the cost of the services, which will result in higher costs to adoptive families.

Inequality in Provisions

Lastly, there appears to be inequality in these provisions. Employees who conduct home studies are required to have a master's degree yet those described in (e) non-supervisory employees who apply other clinical skills and judgment may have a bachelor's degree in any field as long as they also have prior relevant experience.
In addition, employees from "exempt" agencies or persons who only perform home studies are not held to this standard.

In light of these positions, we recommend that section 96.37(f) be modified to allow a bachelor's degree personnel to perform a home study but have a master's degree supervisor review and approve the home study.

We suggest the following revision:

> **96.37(f)** Home studies. The agency's or person's employees who conduct home studies:
>
> (1) Have ~~a minimum of~~ a master's degree from an accredited program of social work education ~~or a~~; master's degree (or doctorate) in a related human service field, including, but not limited to psychology,

psychiatry, psychiatric nursing, counseling, rehabilitation counseling, or pastoral counseling; **a minimum of a bachelor's degree from an accredited program of social work education; or a combination of a bachelor's degree in another human service field with prior experience in family and children's services, adoption or intercountry adoption;**

(4) In cases where the home study is completed by an employee with a bachelor's degree, the home study must be reviewed and approved by a supervisor who meets the requirements for supervisors in 96.37(d).

The current standard in most states is to have a master's degree supervisor review and approve a bachelor's degree personnel home study. This modification would align the proposed rule with the current standard and eliminate the problems outlined above.

If the Department refuses to alter this regulation, we would then respectfully request that a grand-fathering provision, such as found in (d)(3) of 96.37, be instituted for home study personnel.

Recommend the following addition if our above recommendation of allowing bachelor's degree personnel to perform home studies is denied:

> (f)(4) In the case of employee who is or was an incumbent at the time the Convention enters into force for the United States, the employee has significant skills and experience in intercountry adoption and with performing home studies and has regular access for consultation and approval purposes to an individual with the qualifications listed in paragraph (f)(1) of this section.

96.39(d) Blanket Waivers of Liability

This proposed rule prohibits the agency or person from requiring a client or prospective client to sign a blanket waiver of liability. We are unclear what the Department defines as a "blanket waiver" of liability; please define more specifically. CHI feels that it is imperative to educate the client or prospective client on the various risks associated with intercountry adoption, including but not limited to: unknown or improperly diagnosed medical conditions, uncertainty with foreign government operations and dangers of traveling abroad.

Currently, it is standard practice for agencies to advise their clients that international adoption is not a risk-free means of growing their families. After acknowledging the possible hurdles and roadblocks, many prospective adoptive parents choose to proceed despite the known obstacles. However, this regulation would appear to alter current practice substantially, and to prohibit adoption agencies from protecting themselves in a reasonable manner. Simply stated, to be able to survive as a business, agencies must be able to share the risk and to protect themselves contractually from the threat of litigation by adoptive parent(s). Agencies need to educate their clients about the inherent risks and have the client decide whether or not they wish to proceed. As stated in an article on this topic:

> *In a litigious society such as ours, the ability of an agency to educate prospective parents about the risks of international adoption and then to ask them to accept those risk is indispensable to an agency's ability to carry out its charitable purpose...Put simply, the risks are multiple and known; and absent an ability to require prospective adoptive parents to a voluntarily accept the known risks, agencies may be precluded*

from their critical mission of finding homes for children.

Imposition of a statutory prohibition such as that proposed in this regulation is inappropriate interference with a well-justified business practice.

Furthermore, in the DC adoption case of Ferenc vs. World Child (Ferenc, et al, vs. World Child, et al, 977 F. Supp 56, [1997, U.S. Dist. Ct., D.C.], affirmed, U.S. Cir. Ct., D.C. [1998, No. 97-7167]), the Federal Circuit Court for the District of Columbia upheld the validity of contract waiver clauses in service agreements between agencies and potential adoptive parents. Eventually the Court dismissed all of the plaintiff's claims prior to trial, finding in favor of the defendants that there was no fraud or intentional misrepresentation, and that waiver clauses were valid as a matter of public policy in contract cases.

In addition, we have heard from doctors with international adoption practices that they no longer give medical diagnosis or opinions but only provide a 'risk assessment' to the prospective adoptive parents in order to estimate the probabilities of damage to a particular child. Clearly this is due to the fact that they recognize the inability of US-based doctors to make a diagnosis when they have not personally examined the child and rely solely upon a third-party's representation of the situation in a foreign country. It is, in our opinion, problematic that the Department is holding adoption agencies to a higher standard than medical physicians.

In addition, with the proposed liability that the current regulations hold us to, having no way to protect ourselves and taking all of the risks, liability, is not possible. Our insurance companies request copies of our contracts, waivers, etc., for review before they give us coverage. If we have no risk acknowledgement in the contract on the part of the family, our insurance company will not cover us.

Recommend the following revision:

> Current provision in 96.39(d) be eliminated and replaced with:
>
> (d) The agency or person **may** require a client or prospective client to sign a waiver of liability in connection with the provision of adoption services in Convention cases, **provided that it specifies in clear language the multiple risks of intercountry adoption and asks the client to voluntarily assume these risks as a condition of receiving services.**

This modification will align the regulation with current practice and encourage the identification and full disclosure of risks to prospective adoptive parent(s).

96.40(f)(3)

Recommend the following revision:

> (3) It provides written receipts to the ~~prospective~~ adoptive parent(s) for **total fees collected directly by the agency** in the Convention country and retains copies of such receipts.

The word "prospective" should be struck from this sentence since by this time the clients are adoptive parents and no longer prospective.

Agencies should only be required to provide receipts for fees that they themselves collected and

cannot be expected to give receipts for services, which they did not perform. The addition of the phrase "total fees collected directly by the agency" clarifies the agency's accounting responsibility. This also leaves out having to provide receipts from the country of origin.

Proposed Structure Promotes Litigation

This regulation places an enormous financial burden on agencies. Most agencies do not possess deep pockets – they are non-profit corporations with inherently limited resources. Non-profit corporations face enough of a challenge in training and promoting responsible behavior of, and protecting themselves from the negligence of, their own employees without asking them to assume responsibility for local service providers in the U.S. as well as for third party independent contractors in foreign lands.

Agencies are in business to promote the charitable purpose of "unit[ing] children living in terrible conditions in foreign orphanages with parents who want them," Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000 (Appendix D). For this reason, the state and federal government have granted such agencies non-profit status so that they can fulfill their important mission.

If anything, non-profit corporations deserve protection from liability in this already overly litigious society. For this precise reason, some states have enacted statutes that provide non-profits with immunity from liability for its own negligence. For instance, the New Jersey Charitable Immunity statute provides as follows:

> No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees... shall ... be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation ... where such person is a beneficiary, to whatever degree, of the works of such nonprofit...(See e.g. N.J. 2A:53A-7 in Appendix E).

Non-profit immunity statutes codify the public policy that ensures that the dedicated staff of not for-profit corporations can accomplish their charitable purpose free of fear from litigation due to negligence. Forcing non-profit international adoption corporations to expressly assume the liability not only for their own employees but for supervised providers here and in foreign lands over which agencies have no direct control runs counter to other non-profit policy and law and imposes an unduly heavy burden.

Foreign Supervision

The regulations further require agencies to assume responsibility for their foreign supervised providers. This is an impossible task and assumption of liability by primary provider agencies is an ineffective means of accomplishing it.

We would like to take this opportunity to describe the practical real-world circumstances that agencies face everyday. It is the same circumstances that necessitate international adoption that create uncertainty and risk in the process. For example, birthmothers abandoning children due to extreme poverty, lack of adequate care and/or ability to receive and provide care for a child. This often occurs with some degree of sub-standard pre- and post-natal care and possible undiagnosed genetic conditions. The term "abandonment" alone dictates that often very little information may be known about a child's medical history or genetic disposition. Orphanage workers are usually not skilled, trained medical professionals, but instead well-meaning volunteers or low-paid labor providing basic care only. Orphanage staff spend their

time and resources in meeting the basic life-sustaining needs of the children and are usually ill-equipped to focus on extensive and accurate medical evaluations and diagnosis. In many instances, adequate testing to determine true levels of physical, development and/or emotional delays is not readily available in third world countries, too cost-prohibitive for under-funded orphanages, or is viewed as an unnecessary expense to waste on the country's unwanted children.

American agencies cannot reasonably be expected to track down every birthmother regarding genetic predispositions, visit every orphanage, attend every doctor's visit, and file every paper for every child eligible for international adoption. American agencies' chances of successfully policing their foreign counterparts are extraordinarily difficult to accomplish, and this purpose will not be furthered effectively by imposition of liability on agencies.

American agencies can, however, comply with the other suggestions set forth in section 96.46. Specifically, they can perform a reasonable investigation of our foreign contacts, ensure they understand and comply with the policies behind the Hague Convention and the general standards of reasonable care and ethical practice. Agencies can further ask foreign contacts to sign contracts whereby they certify to comply with the
Hague Convention policies and continue to monitor and train their employees concerning acceptable procedure and practice. Disregarding the liability provisions, the remaining subsections of 96.46 propose a framework for improved supervision and accountability that is workable.

Transfer of Convention Cases

Regulation **96.77(b)** distributes too much power to the accrediting entity. The accrediting entity is empowered to suspend an accredited agency without notice (96.76(b)) and order that its files and cases be transferred to another agency. If the suspension was done without notice, without any standard of evidence contained in the regulations for the accrediting entity to base its actions, then the accredited agency possibly innocent of malicious efforts, could find itself out of business before it could appeal the act of the accrediting entity. In addition to the necessity of a detailed appeal process, there also needs to be clear definitions of how an accrediting entity would transfer Convention cases to another agency and if the prospective adoptive parents have a say in the decision.